FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 10 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959.

No. [redacted] 107

FRANK MALFI,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
*Counsel for Petitioner.*

M. GENE HAEBERLE,
420 Parkade Building,
518 Market Street,
Camden 2, N. J.,
*Of Counsel.*

International, 711 So. 50th St., Phila. 43, Pa.

## INDEX TO PETITION.


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 2 |
| Statement | 4 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 8 |
| Appendix A—Opinion Below | 9 |
| Appendix B—Judgment Below | 18 |
| Appendix C—Order Denying Rehearing | 19 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Casey v. United States, 276 U. S. 413 | 7 |
| Harris v. United States, 359 U. S. 19 | 6, 7 |
| Jackson v. United States, 250 F. 2d 772 (D. C. Cir. 1957) | 6 |
| Tot v. United States, 319 U. S. 463 | 7 |
| United Brotherhood v. United States, 330 U. S. 395 | 8 |
| United States v. Landry, 257 F. 2d 425 (7th Cir. 1958) | 6 |
| United States v. Malfi, 264 F. 2d 147 | 1 |
| Yee Hem v. United States, 268 U. S. 178 | 7 |


## TABLE OF STATUTES CITED.


| | Page |
|---|---|
| 18 U. S. C. § 2 | 2, 7, 8 |
| 18 U. S. C. § 371 | 4 |
| Narcotic Drugs Import and Export Act, 21 U. S. C. 174, 35 Stat. 614, as amended by the Act of July 18, 1956, c629, Title I, Sec. 105, 70 Stat. 570 | 2, 4, 6, 8 |
| Internal Revenue Code of 1954, Sec. 4705(a), 26 U. S. C. (1952 ed., Supp. IV) 4705(a) | 2, 3, 4 |
| 28 U. S. C. 1254(1) | 1 |

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1959

No.

FRANK MALFI,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Frank Malfi, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 4, 1959.

## OPINION BELOW.

The opinion of the court below is reported in *United States v. Malfi*, 264 F. 2d 147, (Appendix A *infra*, pp. 9-17).

## JURISDICTION.

The judgment of the Court of Appeals was entered on March 4, 1959 (Appendix B *infra*, p. 18). A timely petition for rehearing was denied on May 12, 1959 (Appendix C *infra*, p. 19). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED.

1. Whether petitioner can be properly convicted under 21 U. S. C. § 174, making it an offense knowingly to deal in narcotics illegally imported into the United States, and providing that possession of the drug shall be sufficient to authorize conviction, without proof of possession of such narcotics and without proof that the narcotics were actually imported contrary to law or that petitioner knew them to be so imported.

2. Whether, where a petitioner charged under 26 U. S. C. § 4705(a) with unlawfully selling narcotics is linked to the sales only by the aider and abettor provision, 18 U. S. C. § 2, it is a sufficient instruction for the Judge simply to read the text of the latter statute without explaining it to the jury.

## STATUTES INVOLVED.

18 U. S. C. 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

21 U. S. C. 174 of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of July 18, 1956, c629, Title I, Sec. 105, 70 Stat. 570, provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any

territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U. S. C. (1952 ed., Supp. IV) 4705(a), Sec. 4705(a) of the Internal Revenue Code of 1954 provides:

"General Requirements. It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order to the person to whom such articles is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

## STATEMENT.

Petitioner was jointly indicted for sale, purchase, concealment, receipt, conspiracy and transfer without written authority of narcotics for transactions occurring on July 25, 1957 and August 22, 1957 (R.*2a-5a).

Count I alleged that on July 25, 1957, Santore and the petitioner did, in Washington Township, New Jersey, knowingly receive, conceal, buy, and sell 10 ounces 6½ grains ingly receive, conceal, buy, and sell 10 ounces 6½ grains of heroin, "well knowing the same to have been imported and brought into the United States contrary to law," in violation of 21 U. S. C. § 174.

Count II alleged the same transaction as a sale, barter and exchange in violation of 26 U. S. C. Sec. 4705(a).

Count III alleged that, on August 22, 1957, Santore and the petitioner did, in Washington Township, New Jersey, knowingly receive, conceal, buy, and sell 17 ounces 153½ grains of heroin, "well knowing the same to have been imported and brought into the United States contrary to law," in violation of 21 U. S. C. § 174.

Count IV alleged the August transaction as a sale, barter and exchange in violation of 26 U. S. C. § 4705(a).

Count V was the usual conspiracy catch-all under 18 U. S. C. § 371, and alleged that petitioner and Santore conspired to commit an offense in violation of 21 U. S. C. § 174.

The Government's case was put on through two narcotics agents.

Picini testified that he and Agent Marshall met Santore in Philadelphia on July 18, 1957, that Santore said he had made arrangements to have Picini and Marshall meet his

* "R" refers to the Appendix filed by petitioner in the Court below and there designated Appellant's Appendix.

connections, and that Santore was paid $300 by Picini at that time (R. 6a-7a).

On July 23, the agents met Santore, and were driven to another place in Philadelphia where they were introduced to the petitioner; the four men discussed terms for the purchase of uncut heroin (R. 8a). The next day, another meeting took place (R. 8a-9a). The agents paid petitioner $3,000 in advance for half a kilo, and told petitioner and Santore that they wanted delivery at the King Cole Motel (R. 9a), in New Jersey (R. 10a). Next day Santore drove up to the motel, and delivered the package to the agents, in return for $2,000 more (R. 10a). Santore was not given an order form by the agents (R. 10a). It was stipulated that the package contained 10 ounces 6½ grains of heroin (R. 14a-17a).

On July 29, Santore informed both agents that he had delivered more than he thought, and that petitioner wanted more money (R. 11a). Petitioner confirmed this, and Picini paid him $750 more (R. 11a).

On August 5, the agents again met petitioner and Santore in Philadelphia; petitioner said he had half a kilo, for which he agreed to take $5,100 and Santore $600 (R. 12a). Petitioner after discussion said he was prepared to receive $3,100 in advance and this was paid him by Picini (R. 12a). On August 21, the agents visited petitioner and demanded either delivery or the return of the money already paid (R. 12a). Petitioner said the money was already in the hands of the "connection", and that Santore would make delivery (R. 12a-13a). The agents went to the King Cole Motel in New Jersey, and the next morning Santore arrived and deliverd 17 ounces 153 grains of heroin (R. 16a-17a), for which the agents paid him $2,250 (R. 13a). Santore was not given an order form by the agent (R. 13a). Four days later the agents met Santore in Philadelphia and paid him $300 more (R. 13a).

Petitioner did not deliver any heroin (R. 23a), he was not in New Jersey at the time of any of the deliverites

(R. 23a), and his fingerprints were not on either package (R. 32a).

Agent Marshall corroborated Picini's testimony in all its details (R. 25a-34a), and added that petitioner was never found in the possession of any heroin (R. 34a).

A motion for judgment of acquittal on petitioner's behalf was denied (R. 36a), and petitioner rested before the defendant Santore testified (R. 37a).

Petitioner was found guilty on all five counts (R. 58a), and sentenced to serve 15 years on each of the substantive counts and to 5 years on the conspiracy counts, all of the sentences to run concurrently (R. 59a). Petitioner did not appeal the conspiracy conviction. The court below affirmed the judgments of conviction.

## REASONS FOR GRANTING THE WRIT.

The issues now presented are not mere questions of evidence but, in fact, involve protections of the individual under statutes of general importance.

1. (a) The opinion of the Court below is in conflict with the recent opinion of this Court in *Harris v. United States*, 359 U. S. 19, as well as *United States v. Landry*, 257 F. 2d 425 (7th Cir. 1958) and *Jackson v. United States*, 250 F. 2d 772 (D. C. Cir. 1957).

The Court below, in its opinion (Appendix A, *infra*, p. 13), stated as follows:

> "At the minimum the testimony recited established that Malfi had 'in his control or dominion' the heroin sold on July 25, and August 22, 1957 and it is well settled that 'possession of a thing means having it in one's control or under one's dominion', *Brown v. United States*, 9th Cir. 1955, 222 F. 2d 293, 297."

When one has actual possession, he has it under his control, but the opposite does not follow. 21 U. S. C., § 174 requires possession to call the presumption into play. This

Court, in *Harris v. United States*, 359 U. S. 19, 23, 24, stated:

> "To take advantage of the presumption of Sec. 174 it is necessary only to prove possession by direct evidence. Whereas, to take advantage of the presumption of Sec. 4705(a) it is necessary to prove by direct evidence that the Narcotic was unstamped as well as that it was in the defendant's possession."

There is here no direct proof of possession.

(b) There is no direct or circumstantial evidence that the drugs were imported and that the petitioner knew it, essential to this offense, in the absence of the presumption authorized by the statute from possession of the narcotics.

Petitioner is aware of 18 U. S. C. § 2, which turns accessories and accomplices into principals, but the question is not whether he is in law to be made criminally liable as a principal, it is whether in fact he had possession. And to argue that because he is to be held as a principal, therefore he had the fictitious possession, and therefore it is to be presumed that he knew the drugs were illegally imported, is to go a very long step beyond the rational basis that was held to exist in *Yee Hem v. United States*, 268 U. S. 178; *Casey v. United States*, 276 U. S., 413. Instead of taking one step, it is necessary to take two steps. The law does not go that far. *Tot v. United States*, 319 U. S. 463.

Indeed, to hold petitioner under Counts I and III, by piling a presumption upon a rule of legal liability, thus making the combination do service for a crime very specifically delienated by the statute, would be to enter the odious field of constructive crime, and to fasten criminal liability by a fiction. Such a course is foreign to our concepts of Due Process.

2. The Trial Court simply read to the jury the provisions of 18 U. S. C. § 2, without explaining the meaning and scope to the jury (R. 48a). Here, petitioner was linked

to the sale charged in Counts II and IV only by the provisions of 18 U. S. C., § 2. It was therefore essential that those provisions be explained and expounded to the jury and limited to those counts. "A Trial Court does not discharge it duty merely by quoting a statute relevant to the conduct of the trial." *United Brotherhood v. United States*, 330 U. S. 395, 416, per Frankfurter, J. Under principles frequently laid down in this Court and even in the Court below, there is here fundamental error, especially since there was a conspiracy count to commit an offense in violation of 21 U. S. C. § 174 in the same indictment and a *lengthy charge* on conspiracy (R. 52a-55a). The Court below observed that the Trial Judge had prefaced his reading of 18 U. S. C. § 2 with the statement that Congress had prescribed the status of those alleged to have been "associated with others in the commission of crime" and that this "is certainly layman's language for the statutory terms 'aids, abets, counsels, commands, induces or procures', and no clearer exposition could possibly have been made" (Appendix A *infra*, p. 16). But the Court's charge on aiding and abetting was not specifically limited to Counts II and IV. We submit that there was fundamental error requiring reversal, even in the absence of an objection.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
*Counsel for Petitioner.*

M. GENE HAEBERLE,
420 Parkade Bldg.,
518 Market St.,
Camden, N. J.,
*Of Counsel.*

## APPENDIX A.

### Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,623

UNITED STATES OF AMERICA

*v.*

FRANK MALFI,

*Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 24, 1958

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges*

OPINION OF THE COURT

(Filed March 4, 1959)

By KALODNER, *Circuit Judge*

Following a jury trial, defendant-appellant Frank Malfi and James Santore were found guilty of violations of the narcotic [1] and conspiracy laws.[2]

1. 21 U. S. C. § 174 (1952) and 26 U. S. C. § 4705(a) (1952 Supp. V).

2. 18 U. S. C. § 371 (1952).

Malfi prosecutes this appeal from the District Court's judgment of conviction, entered following its denial of his motion for judgment of acquittal or for a new trial, on these grounds: there was insufficient evidence to sustain the jury's verdict as to Counts 1 and 3 of the indictment, and fundamental error by reason of inadequate instructions to the jury with respect to the offenses charged in Counts 2 and 4. The conspiracy conviction in Count 5 is not challenged.[3]

The five-count indictment related to illegal sales of substantial quantities of heroin allegedly made by Malfi and Santore in Washington Township, New Jersey, on July 25 and August 22, 1957.

Viewing the evidence in the light most favorable to the Government, as the jury's verdict requires, the facts are as follows:

Federal narcotic agents Picini and Marshall met Santore in Philadelphia, Pennsylvania, on July 18, 1957, subsequent to previous negotiations and conversations; at that time Santore told the agents he had made arrangements for them to meet "his connection" and asked for and received $300.00; on July 23, the agents met Santore and Malfi and discussed terms for the purchase of uncut heroin; at that time Malfi said that "he had made arrangements with his connection, and had been advised that he could obtain uncut heroin" provided "the money would have to be paid in advance"; on July 24 the agents met Malfi and Santore and paid him $3,000.00 in advance for half a kilo of heroin which was to be delivered by Santore at the King Cole Motel near Williamstown, New Jersey; on July 25 Santore delivered 10 ounces 6½ grains of heroin to the agents at the King Cole Motel, receiving an additional $200.00 at the time; on July 29 Santore, in the presence of Malfi, advised the agents that he had delivered more than he thought and later that day the agents paid Malfi an additional $750.00—the agreed price; on August 5 and again on August 13 the

3. Malfi was sentenced to serve 15 years on each of the four counts charging violation of the narcotic laws and 5 years on the conspiracy counts, all of the sentences to run concurrently.

agents met Malfi and Santore in Philadelphia and negotiated the purchase of another half a kilo of heroin for $5,100.00 to be paid to Malfi and $600.00 to Santore; $3,100 was paid on account by Picini to Malfi at the August 13 meeting; on August 21 the agents went to Malfi's home and complained to him about the failure to deliver the heroin and were told by him that the $3,100.00 "was already in the hands of the connection, that he was going up that night to make sure that the heroin would be delivered either late that night or the next day" and that "as soon as he got the heroin he would deliver it to Santore, and Santore would deliver it to us, and said for us to remain at the motel, and Santore would contact us there"; on the morning of August 22 Santore delivered to the agents at the motel 17 ounces, 153 grains of heroin and was paid $2,250.00; four days later the agents paid Santore an additional $300.00; no written order for the heroin was ever given by the agents to Malfi or Santore; Malfi was not in New Jersey when the deliveries of the heroin took place and his fingerprints were not found on the packages delivered.

Malfi moved for acquittal at the close of the Government's case, and when his motion was denied, rested.

In Count 1 Malfi and Santore were charged with the sale made on July 25, 1957, and in Count 3 with the sale on August 22, 1957, in violation of 21 U. S. C. § 174; Counts 2 and 4 charge them with making the respective sales in violation of 26 U. S. C. § 4705(a).

Title 21 U. S. C. § 174 provides in applicable part:

> "Whoever fraudulently or knowingly imports . . . any narcotic drug into the United States . . . contrary to law . . . or . . . sells, or in any manner facilitates the transportation . . . or sale of any such narcotic drug after being imported . . . knowing the same to have been imported, contrary to law, or conspires to commit any of such acts . . . shall be imprisoned . . . and . . . may be fined . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26 U. S. C. § 4705(a) provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

With respect to Counts 1 and 3, Malfi contends that the evidence is insufficient to sustain the judgment, there was not "direct" evidence he says that he knew the narcotics had been illegally imported or that he ever had physical possession of the heroin sold, and, consequently, the presumption of illegal importation did not come into play, so that he committed no offense under 21 U. S. C. § 174.

As to Counts 2 and 4, says Malfi, in the absence of evidence that he was in New Jersey in connection with the illegal sales he could not have been convicted in the District of New Jersey except under the provisions of 18 U. S. C. § 2 (1952), which makes aiders and abettors principals, and since "that statute constituted his only link to the substantive offense alleged" in these counts it was essential that the scope of this statute "be clearly and fully explained to the jury but this was not done"; the trial judge "simply read" the statute. The failure to explain the scope of the statute, Malfi contends, constituted fundamental error requiring reversal even though there was no objection or request for amplification of the instruction to the jury.

Taking first Malfi's contentions with respect to Counts 1 and 3:

Applicable to these contentions is this well-settled rule:

> "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 1942, 315 U. S. 60, 80.

Upon review of the record we are of the opinion that the testimony earlier summarized discloses that there was ample basis for the jury's finding of "possession" on Malfi's part. With respect to the sale on July 25 it was testified by the agents that at their conference with Malfi on July 23 when they discussed terms for the sale of the heroin, Malfi said "he had made arrangements with his connection, and had been advised that *he could obtain* uncut heroin" provided "the money would have to be paid in advance"; following the payment in advance on July 24, Santore the next day delivered the heroin.

In connection with the August 22 sale, the evidence disclosed that arrangements as to it were made by the agents directly with Malfi and he was paid $3,000 in advance on August 13; when the agents on August 21 complained to Malfi about the delay in delivery he said "he was going up that night to make sure the heroin would be delivered either late that night or the next day" and that "as soon as *he got the heroin* he would deliver it to Santore, and Santore would deliver it" in New Jersey; that the heroin was delivered in accordance with Malfi's commitment on August 22.

At the minimum the testimony recited established that Malfi had in his "control or dominion" the heroin sold on July 25 and August 22 and it is well settled that "possession of a thing means having it in one's control or under one's dominion". Brown v. United States, 9th Cir. 1955, 222 F. 2d 293, 297.

Although we view the testimony as affording sufficient "direct" proof of possession, it is established, although Malfi contends to the contrary, that such proof need not be

"direct" in order to raise the statutory presumption of § 174. Thus, in United States v. Pisano, 7th Cir., 1951, 193 F. 2d 355, it was said (p. 360):

> "As we understand defendants' contention, they insist that the government must offer direct proof of possession of the drug in order to raise the statutory presumption. We know of no reason why the evidence must be direct. It must be convincing, of course, but when it is clear that no narcotics were received by anybody until shortly after the defendants were present and had been dealt with, the question becomes one of fact for the jury."

In United States v. Pinna, 7th Cir. 1956, 229 F. 2d 216 where it was contended that "direct" proof of possession is essential in order to give rise to presumption of unlawful importation, it was stated (p. 218):

> "We know of no reason, however, why possession proven by circumstantial evidence should be treated any differently from possession proven by direct evidence."[4]

Even though the testimony in the instant case should be regarded as lacking in "direct" proof of possession, the presence of circumstantial evidence here is nigh overwhelming.

For the reasons stated Malfi's contentions with respect to Counts 1 and 3 must be rejected.

We find without merit Malfi's contentions with respect to Counts 2 and 4 which are premised on his view that the trial judge committed fundamental error when he "simply read" to the jury the provisions of 18 U. S. C. § 2, making aiders and abetters principals, without "explaining and expounding" their provisions.

4. See also United States v. LaRocca, 2nd Cir. 1955, 224 F. 2d 859 and United States v. Maroy, 7th Cir. 1957, 248 F. 2d 663, 666, cert. den. 355 U. S. 931.

As previously noted, Malfi did not object nor ask for explanation or clarification of the instructions given and accordingly reversal is justified only if the failure to instruct constitutes "a basic and highly prejudicial error." United States v. Levy, 3rd Cir. 1946, 153 F. 2d 995, 998.

It is true, as we held in United States v. Gordon, 1957, 242 F. 2d 122, 126, cert. den. 354 U. S. 921, that if an instruction fails to define the offense charged, reversal is required. But we there made it clear that where an instruction describes an offense "in proper statutory language" and the "primary law" was read "We must assume that the jury was one of average intelligence, and after sitting through five days of trial, knew very well what was meant by the simple statutory words used to describe the offense . . . and the instructions neither confused nor misled them."

What was said in United States v. Gordon controls in the instant situation.

Here the evidence was overwhelming that Malfi was an active participant—indeed the principal actor—in the July 25 and August 22 sales.

With respect to these sales, which took place in New Jersey when the narcotics were delivered by Santore to the Government agents pursuant to the arrangements completed with Malfi, the jury was fully justified in finding Malfi to be a "principal" under 18 U. S. C. § 2.

The statute provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The provisions of the statute are simple and self-explanatory.

Moreover, it must be noted that the trial judge prefaced his reading of the statute with this statement:

> "Congress has, likewise, seen fit, as is its power, to prescribe the status of those alleged to have been *associated with others in the commission of crime* in the following language . . ." (emphasis supplied)

The term "associated with others in the commission of crime" is certainly layman's language for the statutory terms "aids, abets, counsel, commands, induces or procures" and no clearer exposition could possibly have been made. Indeed, in Nye & Nissen v. United States, 1949, 336 U.S. 613 where the Court approved an instruction by the trial court that one "who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly" it was stated (p. 619):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort *associate himself with the venture*, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, J., in *United States v. Peoni*, 100 F.2d 401, 402". (emphasis supplied)

To the same effect see Pereira v. United States, 1954, 347 U.S. 1, where the Court approved a similar instruction and cited with approval Nye & Nissen v. United States, supra.

What was said in Wheeler v. United States, D.C. 1951, 190 F.2d 663, is particularly pertinent here. There the defendant contended that the trial court failed to adequately instruct the jury on the elements of the crime of impersonating an officer. With respect to that contention the Court said:

> ". . . The trial court read § 22-1306 of the D.C. Code (1940) to the jury as part of the instructions. This was

sufficient. The language of this statute is clear and concise; it contains no words which are obscure, ambiguous or which are used in some restricted, special, or technical sense which the average layman cannot be expected to understand."

Again, in United States v. Maroy, 7th Cir. 1957, 248 F.2d 663, 666, cert. den. 355 U.S. 931, it was held that there was "no merit in defendant's objection" to an instruction which "simply quoted the aiding and abetting statute *ad verbatim.*"[5]

For the reasons stated we are of the opinion that Malfi's contentions with respect to Counts 2 and 4 must be rejected.

This might be added with reference to Counts 2 and 4. In his brief Malfi stated that "On familiar principles [citing cases] it would appear that there was a contract to sell in Pennsylvania and a sale in New Jersey", thus conceding venue in New Jersey. Moreover, in a note to the foregoing quotation Malfi said that if he were in error on this point "and the sale without a written order is deemed to have taken place in Pennsylvania, then, very plainly, venue was wrongly laid in New Jersey." The latter proposition is utterly without merit.

It is specifically provided in 18 U.S.C. § 3237 that ". . . any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

For the reasons stated the judgments of conviction will be affirmed.

---

5. See also Maynard v. United States, D. C. 1954, 215 F. 2d 336, 339 where an instruction in the words of the statute was approved.

## APPENDIX B.

### Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,623.

UNITED STATES OF AMERICA
*v.*
JAMES SANTORE and FRANK MALFI.
FRANK MALFI,
*Appellant;*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
*Clerk.*

March 4, 1959.

## APPENDIX C.

### Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,623.

UNITED STATES OF AMERICA

*v.*

FRANK MALFI.

SUR PETITION FOR REHEARING.

Present: GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

KALODNER.

Dated: May 12, 1959.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 10 1956
[illegible], Clerk

No. [illegible]

# In the Supreme Court of the United States

October Term, 1956

[illegible]

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [illegible]

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General

[illegible]
Assistant Attorney General

[illegible]
Attorney

Department of Justice,
Washington 25, D. C.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 1 |
| Statutes involved | 2 |
| Statement | 4 |
| Argument | 7 |
| Conclusion | 12 |


## CITATIONS

Cases:


| | |
|---|---|
| *Alexander* v. *United States*, 241 F. 2d 351, certiorari denied, 354 U.S. 940 | 9 |
| *Brown* v. *United States*, 222 F. 2d 293 | 9 |
| *Harris* v. *United States*, 359 U.S. 19 | 9 |
| *Jackson* v. *United States*, 250 F. 2d 772 | 10 |
| *Nye & Nissen* v. *United States*, 336 U.S. 613 | 11 |
| *Pereira* v. *United States*, 347 U.S. 1 | 11 |
| *United States* v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U.S. 913 | 9 |
| *United States* v. *Cohen*, 124 F. 2d 164, certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811 | 9 |
| *United States* v. *Hodorowicz*, 105 F. 2d 218, certiorari denied, 308 U.S. 584 | 9 |
| *United States* v. *Landry*, 257 F. 2d 425 | 9 |
| *United States* v. *LaRocca*, 224 F. 2d 859 | 8 |
| *United States* v. *Maroy*, 248 F. 2d 663, certiorari denied, 355 U.S. 931 | 9, 11 |
| *United States* v. *Pinna*, 229 F. 2d 216 | 8 |
| *United States* v. *Pisano*, 193 F. 2d 355 | 8 |


Statutes and rule:


| | |
|---|---|
| 18 U.S.C. 2 | 2, 8, 10, 11 |
| 21 U.S.C. (1952 ed., Supp. V) 174, 70 Stat. 570 | 2, 4, 7, 8, 9 |
| 26 U.S.C. (1952 ed., Supp. V) 4705(a), 68A Stat. 551 | 3, 4, 7, 9, 10 |
| Rule 30, F. R. Crim. P. | 10 |

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 107

FRANK MALFI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-17) is reported at 264 F. 2d 147.

### JURISDICTION

The judgment of the court of appeals was entered on March 4, 1959 (Pet. App. 18). A petition for rehearing was denied on May 12, 1959 (Pet. App. 19). The petition for a writ of certiorari was filed on June 10, 1959. The judisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioner had possession of narcotics so that a presumption of guilt for illegal dealing in such

narcotics arose under 21 U.S.C. 174, where strong circumstantial evidence disclosed that he had unexplained dominion and control over the narcotics and aided and abetted a co-defendant in their sale.

2. Whether part of a charge not objected to, in which the court read provisions of the aider and abettor statute (18 U.S.C. 2) and explained its meaning, was proper although not expressly limited to the substantive counts involving narcotics sales, and where a conspiracy count was covered later in the charge.

## STATUTES INVOLVED

21 U.S.C. (1952 ed., Supp. V) 174, 70 Stat. 570, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954.

26 U.S.C. (1952 ed., Supp. V) 4705(a), 68A Stat. 551, provides:

*Order Forms.*

*(a) General Requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Secretary or his delegate.

18 U.S.C. 2 provides:

*Principals.*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner was charged, together with defendant Santore, in a 5-count indictment in the United States District Court for the District of New Jersey. Counts I and III charged the illegal receipt and sale of certain quantities of heroin in violation of 21 U.S.C. 174 (*supra*, p. 2) on July 25, 1957 and August 22, 1957 (R. 2, 3). Counts II and IV charged illegal sales of this heroin without written order forms in violation of 26 U.S.C. 4705(a) (*supra*, p. 3) on the same dates (R. 2, 3). Count V was a conspiracy count (R. 3-5). The defendants were found guilty on all counts, and petitioner was sentenced to 15 years' imprisonment on the first four counts and five years on the conspiracy count, the sentences to run concurrently (R. 58, 59). On appeal, in which conviction on the conspiracy count was not challenged, conviction on the other counts was unanimously affirmed (R. 1; Pet. App. 9-18).

The evidence adduced at the trial may be summarized as follows:

Subsequent to previous negotiations with defendant Santore, narcotics agents Picini and Marshall met with him at a delicatessen in Philadelphia on July 18, 1957 (R. 6, 7). Santore informed the agents that he had made arrangements for them to meet his "connection" and asked for, and received, an advance of $300 (R. 7). On July 23, Santore introduced the agents to petitioner, who stated that he had discussed with Santore the fact that the agents wanted to purchase some uncut heroin. Petitioner announced that "he had made arrangements with his connection, and had been advised that he could obtain uncut heroin", provided the

"money would have to be paid in advance". Petitioner stated that he would not personally deliver the drugs, but that delivery would be made by Santore (R. 8, 19, 27).

On the night of July 24, agents Picini and Marshall met petitioner and Santore in Philadelphia and paid petitioner $3,000 in advance for a half kilo of heroin, which petitioner said would be delivered by Santore at the King Cole Motel near Williamstown, New Jersey (R. 9-10, 27-28). On July 25, Santore delivered to the agents a package containing 10 ounces, 6½ grains of heroin and was paid an additional $200. This purchase was made without a written order form (R. 10, 16, 28-29). On July 29, agent Picini paid petitioner an additional $750, when informed that Santore had delivered a larger amount of heroin than he thought he was delivering (R. 11, 29).

After further negotiations, on August 13, 1957 the agents paid petitioner $3,100 as an advance on an agreed $5,100 price for another half kilo of heroin, which was to be delivered in a few days (R.12). On August 21, the agents went to petitioner's home and demanded either delivery of the heroin or return of their money. Petitioner told them that the "money was already in the hands of the connection, that he was going up that night to make sure that the heroin would be delivered either late that night or the next day"; that "as soon as he got the heroin he would deliver it to Santore, and Santore would deliver it" to them; and that they should remain at the motel, where Santore would contact them (R. 12-13). On the morning of August 22, Santore delivered to the agents at the motel 17 ounces, 153½ grains of heroin.

The agents paid Santore $2,250 at that time, and $300 more on August 26 (R. 13, 17, 30). There was no written order form for the heroin sale on August 22 (R. 13, 31).

On cross-examination, the agents testified that petitioner did not make any heroin deliveries in New Jersey, and that his fingerprints were not discovered on the packages in which the deliveries were made (R. 23, 32).

In its charge to the jury, after quoting constitutional and statutory provisions regarding venue, the court stated as follows (R. 48):

> Congress has, likewise, seen fit, as is its power, to prescribe the status of those alleged to have been associated with others in the commission of crime in the following language: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal." "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Petitioner made no objection to this part of the charge. The court then went on to state that the crimes charged were two alleged sales of narcotics in New Jersey on July 25 and August 22, 1957, and gave legal definitions as to what constitutes a sale and the passing of title (R. 48-49). The charge then continued (R. 49):

> In reference to the charge in this particular case, if you would find that the article in question was contraband, it would hardly be possible to effect the passing of legal title, so that in the main,

you will concern yourself, as far as sale is concerned, with the passing of possession.

You will, therefore, inquire into all the evidence and determine whether under all the terms and conditions surrounding this transaction, the defendants completed their acts in Philadelphia, Pennsylvania. If so, then this court would not have jurisdiction, and your verdict would have to be one of not guilty. If, on the other hand, you find from all the evidence that such sale was not completed in Philadelphia, Pennsylvania but that the defendants participating in such sale had terms and conditions thereof calling for delivery of the narcotics in question in New Jersey, and that such sale would not be complete until possession was delivered to the agents at the King Cole Motel in Williamstown, New Jersey, and that thereafter such possession was, in fact, delivered to the agents in Williamstown, New Jersey, then this court would have jurisdiction.

ARGUMENT

Any one of the four substantive counts on which petitioner was convicted will support the sentence imposed. Petitioner therefore necessarily attempts to challenge his convictions under both 21 U.S.C. 174 and 26 U.S.C. 4705(a). Neither of his contentions has merit.

1. Petitioner contends that, since there was no direct proof of his possession of the narcotics, the government cannot make use of the presumption under 21 U.S.C. 174 (*supra*, p. 3) as proof that the narcotics were imported or that petitioner knew they had been imported contrary to law (Pet. 6-7).

Evidence as to an accused's possession of narcotics need not, however, be direct in order to give rise to the statutory presumption of guilt under 21 U.S.C. 174; such evidence may be circumstantial. *United States* v. *Pisano*, 193 F. 2d 355, 360 (C.A. 7); *United States* v. *Pinna*, 229 F. 2d 216, 218 (C.A. 7). Here, there was strong and cogent circumstantial evidence that petitioner did have possession of the narcotics which would bring the statutory presumption into play. In regard to the sale on July 25, 1957, in the preliminary conference with the agents on July 23, petitioner stated that he had made arrangements with his connection and could obtain uncut heroin if payment were made in advance. Following advance payment to petitioner on July 24, Santore made delivery the following day (*supra*, pp. 4, 5). With respect to the sale on August 22, the agents paid petitioner $3,100 in advance on August 13, and on August 21 they complained about delay in delivery. Petitioner replied that "he was going up that night to make sure that the heroin would be delivered either late that night or the next day," and that "as soon as he got the heroin he would deliver it to Santore, and Santore would deliver it" to the agents. Santore did make delivery on August 22 in accordance with petitioner's promise (*supra*, pp. 5, 6). Under this evidence, a "member of the jury who was not by such evidence convinced beyond a reasonable doubt that it was [the accused] who had sold the heroin for the money he received would have been naive indeed." *United States* v. *LaRocca*, 224 F. 2d 859, 860 (C.A. 2).

Although stating that he is aware of the aider and abettor statute (18 U.S.C. 2, *supra*, p. 3), petitioner really seeks to ignore its application altogether.

Although petitioner was extremely cautious in not physically making delivery of the heroin but leaving that to his co-defendant Santore, petitioner was the principal actor in the transactions. He had such control, dominion, and power of disposal over the narcotics as to constitute possession. Cf. *Brown* v. *United States*, 222 F. 2d 293, 297 (C.A. 9); *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U.S. 584. At the least, he aided and abetted Santore so that Santore's possession of the narcotics was possession by petitioner as well. See the analogous case of *United States* v. *Maroy*, 248 F. 2d 663, 666 (C.A. 7), certiorari denied, 355 U.S. 931. See also *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C.A. 7), certiorari denied, 342 U.S. 913; *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *Alexander* v. *United States*, 241 F. 2d 351, 355, 356 (C.A. 8), certiorari denied, 354 U.S. 940.

There is no conflict in decisions as asserted by petitioner (Pet. 6). *Harris* v. *United States*, 359 U.S. 19, does not hold that it is necessary to prove possession of the narcotics by direct—as opposed to circumstantial—evidence to take advantage of the presumption under 21 U.S.C. 174, even though in *Harris* there was direct evidence of possession. The passage petitioner quotes is merely an observation as to the difference in proof required for the presumptions under 21 U.S.C. 174 and 26 U.S.C. 4704(a), to show that the offenses were separate and that consecutive sentences could be imposed on each count. In *United States* v. *Landry*, 257 F. 2d 425, 431 (C.A. 7), the court expressly recognized that the "fact of possession may be shown by circumstantial proof," but found that, unlike the situation in the

instant case, the undisputed proof showed possession in a person other than the defendant and rejected the government's argument that ownership of narcotics was proof of possession. And, unlike the instant case where petitioner by reason of his dominion and control over the narcotics had possession, in *Jackson v. United States*, 250 F. 2d 772 (C.A.D.C.), the defendant had no semblance of possession but only a key to his nephew's room and there was no proof that he knew that narcotics were hidden in the room.

2. Neither is there merit to petitioner's belated contention that there was fundamental error when the court merely read to the jury provisions of the aider and abettor statute, 18 U.S.C. 2 (see the Statement, supra, p. 6), without explaining its meaning and without limiting it to counts II and IV, which charged illegal sales of narcotics in violation of 26 U.S.C. 4705(a) (Pet. 7-8). Petitioner did not object to the charge as given,[1] and did not include the matter now urged, either in his requests to charge, or in the renewal of his motion for judgment of acquittal and an alternative motion for a new trial (see R. 38-39, 55-58).

The provisions of 18 U.S.C. 2 appeared in the charge in a context relating to the venue of the substantive charges regarding the two sales under the first four counts of the indictment (R. 48-49). There is no reasonable basis for speculating that the jury would confuse these provisions with the conspiracy instructions relating to count V, which

[1] Rule 30, F. R. Crim. P., provides: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

appeared considerably later in the charge (R. 52-55), after intervening instructions on the subject of entrapment (R. 50-52). When the provisions of 18 U.S.C. 2, which are couched in relatively simple and understandable language, were read almost verbatim[2] to the jury, the court prefaced this with the statement that Congress had seen fit "to prescribe the status of those alleged to have been associated with others in the commission of crime in the following language" (R. 48). Thus, the court did more than just read the statute[3]; it explained it in language intelligible to jurors and consistent with a previous pronouncement by this Court as to what conduct constitutes aiding and abetting under the statute. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619; and see *Pereira* v. *United States*, 347 U.S. 1, 9-11. Under the compelling evidence as to petitioner's participation in the two narcotics sales involved in the first four counts (*supra*, pp. 4-6), the jury could find, without confusion and without being misled, that petitioner had associated with, aided and abetted, and caused Santore to make the illicit drug sales so that petitioner was guilty under the substantive counts as a principal.

---

[2] Although the court, presumably inadvertently, omitted "wilfully" from a reading of clause (b) of 18 U.S.C. 2, at the close of its charge the court did give petitioner's request No. 4 reading, "You must acquit [petitioner] if you find that he did not wilfully and knowingly intend to violate the law" (R. 56).

[3] It has even been held in a narcotics sale conviction, similar to that involved here, that a verbatim quotation of the aider and abettor statute was not objectionable, where there was evidence (as there is here) that the accused had aided and abetted in the transaction. *United States* v. *Maroy*, 248 F. 2d 663, 666 (C.A. 7), certiorari denied, 355 U.S. 931.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*

MALCOLM R. WILKEY,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

AUGUST, 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 O—516583

FILE COPY

FILED
AUG 18 19
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959.

No. 107.

FRANK MALFI,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

# PETITIONER'S REPLY BRIEF.

JACOB KOSSMAN,
1328 Spruce Street,
Philadelphia 7, Pa.,
*Counsel for Petitioner.*

M. GENE HAEBERLE,
420 Parkade Building,
518 Market Street,
Camden 2, N. J.,
*Of Counsel.*

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1959

No.

FRANK MALFI,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## PETITIONER'S REPLY BRIEF.

The nature of the government's opposition to review in this case suggests that a short reply may be of assistance to the Court.

I.

Seven times in *Harris v. United States*, 359 U. S. 19 this Court used the words "direct evidence." This Court is aware of the difference between direct evidence and indirect or circumstantial evidence. *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500; I Wigmore *Evidence* (1940 Ed.) §§ 24, 41. The government sweeps this distinction under the rug.

Of course, circumstantial evidence may be more persuasive than direct evidence but that is not the point here involved. Where guilt rests on a presumption from possession—as it does here—that possession must be conclusively shown—not presumed from circumstances. *People v. Leavitt*, 301 N. Y. 113, 92 N. E. 2d 915.

The government could have indicted petitioner under several other provisions of the law relating to transactions

concerning narcotics. The Internal Revenue Code is replete with punishment for unauthorized dealers in narcotics. For example, see 26 U. S. C. §§ 4704(a), 4705(a), 4721-4724, § 4742. None of these sections require proof that the goods were actually imported contrary to law, nor that defendant knew them to be so. None of them require physical possession as an element of the offense defined, although possession constitutes prima facie evidence of such offense. Significantly § 4724(c) expands the definition of possession to include *control* as presumptive evidence of a violation. This is not true of 21 U. S. C. § 174.

The record here is devoid of any direct evidence that petitioner was in possession of the narcotics. The government does not deny this fact. The evidence in this case may be sufficient to sustain the conclusion that petitioners helped to arrange the sale of the narcotics from his "connection" that he aided and abetted in their transfer, that he was a participant in a conspiracy to transfer. But lacking, as here, proof of the two additional elements—namely, that the drugs were imported, and that petitioner knew it—essential to this offense in the absence of the presumption authorized by the statute from the possession of the narcotics—the evidence is not sufficient to sustain the sentences on Counts I and III.

Proof of possession is obviously not necessarily a part of a sale. *United States v. La Rocco*, 224 F. 2d 859 (C. A. 2, 1955).

## II.

(a) Rule 30, F. R. Crim. P., provides that an objection should be made before *not after* the jury retires. The Record shows that the last words of the Court's charge were: "You may retire." (R. 57a.)

(b) Petitioner in his renewal of motion for judgment of acquittal and an alternative motion for a new trial re-

served the right to file additional and more specific reasons after the charge of the court had been transcribed (R. 58). The record shows that petitioner was sentenced April 9, 1958 after a hearing but the transcript of the trial proceedings was filed May 7, 1958 only after appeal (R. 1).

(c) Although the sentences are concurrent on the four substantive counts, if any are invalid a reduction of sentence might have occurred. See note, 107 U. Pa. L. Rev. 726 (1959).

In view of the importance of the questions involved in the enforcement of the narcotic laws the petition for certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
*Counsel for Petitioner.*

M. GENE HAEBERLE,
420 Parkade Bldg.,
518 Market St.,
Camden, N. J.
*Of Counsel.*